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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,

Plaintiff,

V.

CODY ALLEN EASTERDAY,

Defendant.

No. 4:21-CR-06012-SAB-1

UNITED STATES' RESPONSE TO DEFENDANT'S MOTION TO CONTINUE RESTITUTION DETERMINATION

Plaintiff, the United States of America, by and through Glenn S. Leon, Chief, Fraud Section, Criminal Division, United States Department of Justice, Avi Perry, Deputy Chief, Fraud Section, Criminal Division, United States Department of Justice, John (“Fritz”) Scanlon, Assistant Chief, Fraud Section, Criminal Division, United States Department of Justice, Vanessa R. Waldref, United States Attorney for the Eastern District of Washington, and Russell E. Smoot, Timothy M. Durkin, and Brian M. Donovan, Assistant United States Attorneys for the Eastern District of Washington (collectively, “the United States”), hereby submits this response to Defendant Cody Allen Easterday’s Motion to Continue Restitution Determination. ECF No. 62.

1 The Court should enter a restitution award in the amount of \$178,120,382 at
2 sentencing, which reflects the full amount of the victims' losses, less property returned,
3 without regard to the Defendant's unproven offsets unrelated to the underlying fraud.¹
4 Entry of such a restitution award at sentencing is warranted because the amount of loss
5 has been demonstrated by the United States, is not in dispute by the parties, and is
6 consistent with the statutory requirements of the Mandatory Victims Restitution Act
7 (MVRA). As explained in *United States v. Bright*, “[18 U.S.C.] § 3664 directs the court
8 to order restitution of the full amount of a victim’s loss … without regard to other
9 sources of compensation for the victims. Any such offsets are instead to be handled
10 separately as potential credits against the defendant’s restitution obligation – not as
11 reductions in the amount of that obligation in the first instance.” 353 F.3d 1114, 1121
12 (9th Cir. 2004).

13 If the Court, after it awards full restitution at sentencing, deems it necessary to
14 have an additional hearing on Defendant’s offset allegations, the United States has no
15 role in such a private dispute between Defendant and Tyson Food, has no information
16 with regard to claims since they do not involve the fraud at issue here, and has no burden
17 of proof in respect to Defendant’s claims for offsets. See *United States v. Crawford*, 169
18 F.3d 590, 593 (9th Cir. 1999) (the defendant has the burden of proof under the MVRA
19 to establish a credit or offset of a restitution award). As such, it takes no position in the
20 dispute between the two parties except to confirm it will apply any offsets or credits

21

22 ¹ The United States’ request in this brief that the Court enter a restitution award at
23 sentencing in the full amount of the loss is consistent with its response to Defendant’s
24 counsel on September 22, 2022. ECF No. 62-2 at 37 (“we plan to take the position at
25 sentencing that the Court should (1) enter an order of restitution in the amount agree to
26 in the plea, and (2) orally pronounce and record in the judgment that Cody should
27 receive credit for the ~\$62M to Tysons [sic] and ~\$3.9M to Segale paid out in the
28 bankruptcy”).

1 against Defendant's restitution balance as directed by the Court, if necessary. United
2 States v. Price, 2020 WL 7647368, at *6 (D. Mont. Nov. 18, 2020) ("It is incumbent
3 upon the U.S. Attorney's Office to collect monies and allocate payments in accordance
4 with the restitution order.").

5 Finally, if the Court decides to hold an additional hearing on the question of
6 potential offsets, the Defendant's presence is not required under Fed. R. Crim. P. 43(b)
7 and any such hearing should not delay his reporting to BOP custody.

8 **A. Actual Losses From Defendant's Fraud Are Ascertainable And**
9 **Restitution Should Be Awarded At Sentencing**

10 1. The full amount of the victims' losses from the underlying fraud are undisputed

11 Under the MVRA, 18 U.S.C. §§ 3663A-3664, restitution is mandatory for a
12 conviction based on an offense against property committed by fraud or deceit. 18 U.S.C.
13 § 3663A(c)(1)(A)(ii). The Court must "order restitution to each victim in the full
14 amount of each victim's losses as determined by the court[.]" 18 U.S.C. § 3664(f)(1)(A).
15 "Any dispute as to the proper amount or type of restitution shall be resolved by the court
16 by a preponderance of the evidence." 18 U.S.C. § 3664(e). Accordingly, the United
17 States bears the burden of proving by a preponderance of the evidence that (1) a person
18 or entity is a victim under the MVRA; (2) the amount of the victim's loss; and (3) the
19 causal connection between the defendant's conduct and the victims' losses. *United*
20 *States v. Waknine*, 543 F.3d 546, 556 (9th Cir. 2008).

21 The United States has met its burden. The full amount of the victims' losses
22 arising out of Defendant's criminal conduct is clearly ascertainable, admitted to by the
23 Defendant, and not in dispute. In the Plea Agreement, Defendant agreed to pay
24 restitution in the total amount of \$244,031,132, of which \$233,008,042 is to be paid to
25 Tyson Foods, Inc. ("Tyson Foods") and \$11,023,090 is to be paid to Segale Properties,
26 LLC ("Segale"). ECF No. 10 at 11-12. Moreover, the Pre-Sentence Investigation Report
27 (PSR) identifies restitution in the same amounts to the same victims as the Defendant
28 agreed to in the Plea Agreement. ECF No. 59 at ¶ 24.

1 Since entry of the Plea Agreement, Tyson Foods has received \$62,417,952 and
2 Segale has received \$3,492,798 in payments in the related bankruptcy involving
3 Easterday Ranches and Easterday Farms, *In re Easterday Ranches, Inc.*, Case No. 21-
4 141 and *In re Easterday Farms*, Case No. 21-176, jointly administered. ECF No. 59 at
5 ¶ 25. All parties agree these payments have been received as reported. Further, the
6 parties all agree that Defendant should receive credit for these payments, as well as
7 future additional payments that will come from the administration of the bankruptcy
8 action. *See* 18 U.S.C. § 3663A(b)(1)(B)(ii) (the Court should order the defendant to pay
9 the value of property lost by the victim less “the value... of any part of the property that
10 is returned”); *Robers v. United States*, 572 U.S. 639, 641, 134 S. Ct. 1854, 1856, 188 L.
11 Ed. 2d 885 (2014) (“if the ‘property’ that was ‘damage[d],’ ‘los[t],’ or ‘destr[oyed]’ was
12 the money, then ‘the property ... returned’ must also be the money. Money being
13 fungible, however, ... ‘the property ... returned’ need not be the very same bills or
14 checks”) (citation omitted).

15 Applying the payments received through the bankruptcy proceeding to the loss
16 admitted by Defendant in the Plea Agreement, the PSR recommends the entry of a
17 restitution order in the amount of \$170,590,090 to Tyson Food and \$7,530,292 to
18 Segale, for a total restitution amount of \$178,120,382. ECF No. 59 at ¶ 116. The United
19 States agrees with the recommendation in the PSR as consistent with the Plea
20 Agreement and the applicable restitution statutes. The Defendant did not object to the
21 restitution calculation in the PSR. *See, e.g., United States v. Hernandez-Guerrero*, 633
22 F.3d 933, 937 (9th Cir. 2011) (“The district court is entitled to rely on an unchallenged
23 portion of a PSR”). The United States, therefore, has met its burden of establishing the
24 full amount of each victim’s loss by the preponderance of the evidence and requests that
25 the Court should enter an award of restitution in those amounts at sentencing.

26 //
27 //
28 //

1 2. Defendant's request to delay entry of a restitution award for unrelated and
1 unproven offsets is misplaced and contrary to the MVRA

2 Despite agreeing to an amount of restitution in the plea agreement and not
3 objecting to the PSR, Defendant now contends in his Motion that Tyson Food's actual
4 losses are not ascertainable due to three alleged offsets and, therefore, the Court must
5 continue its restitution determination pursuant to § 3664(d)(5) and not enter restitution
6 at the time of sentencing. This argument is contrary to the clear statutory scheme of the
7 MVRA and unsupported by case law. Moreover, Defendant's request is misplaced
8 because the three potential offsets are completely unrelated to the fraudulent conduct
9 and are not a value realized by Tyson Food within the context of the fraud.

10 The MVRA states, “In no case shall the fact that a victim has received or is
11 entitled to receive compensation with respect to a loss from insurance or any other
12 source be considered in determining the amount of restitution.” 18 U.S.C.
13 3664(f)(1)(B). Under this provision, the potential for outside recovery to a victim for its
14 loss shall not be considered in determining the amount of restitution awarded at
15 sentencing. *See Crawford*, 169 F.3d at 593. The MVRA recognizes, however, that an
16 offset may later be appropriate in certain circumstances after entry of the restitution
17 award. Section 3664(j)(2) provides, “Any amount paid to a victim under an order of
18 restitution shall be reduced by any amount later recovered as compensatory damages
19 for the same loss by the victim in-(A) any Federal civil proceeding; and (B) any State
20 civil proceeding, to the extent provided by the law of the State.” (emphasis added).

21 Accordingly, the statutory scheme under the MVRA is clear: Once the
22 Government establishes a loss amount arising from an offense, as it has done so here,
23 the Court should enter a restitution award at sentencing for the full amount of the
24 victims' losses, less any property returned, without regard to potential offsets and then
25 later credit or reduce a defendant's balance if appropriate. *See Bright*, 353 F.3d at 1121
26 (“§ 3664 directs the court to order restitution of the full amount of a victim's loss ...
27 [any] offsets are instead to be handled separately as potential credits against the
28 defendant's balance.”).

1 defendant's restitution obligation – not as reductions in the amount of that obligation in
2 the first instance"); *Crawford*, 169 F.3d at 593 ("While insurance settlements are
3 excluded in the initial computation of the amount of restitution owed, once that total
4 amount is determined, the defendant is entitled to have the amount of restitution reduced
5 by any amount later recovered by the victim as compensatory damages for the same
6 loss"); *United States v. Sizemore*, 2016 WL 2636263, at *4 (E.D. Tenn. May 6, 2016),
7 aff'd, 850 F.3d 821 (6th Cir. 2017) (based on the plain language of the statute, the Court
8 is required to order restitution in the full amounts without consideration of potential
9 offsets); *United States v. Elson*, 577 F.3d 713, 733 (6th Cir. 2009) (offsets are 'to be
10 handled separately as potential credits against the defendant's restitution obligation-not
11 as reductions in the amount of that obligation in the first instance'); *United States v.*
12 *Alalade*, 204 F.3d 536, 540–41 (4th Cir. 2000) (the district court lacked discretion under
13 the MVRA to order restitution less the full amount of the victim's loss by allowing an
14 offset).

15 Finally, Defendant's attempt to frame his alleged offsets, which he would admit
16 are unrelated to the underlying crime, as benefits realized by Tyson Food in a manner
17 similar to the situation in *Price*, *Robers*, and other similar cases is misplaced. Those
18 cases involve situations where victims retained some value from the fraud. For example,
19 in *Robers* the victim banks retained collateral in the properties that were purchased
20 through the defendant's fraud. Here, there was no value received or retained by Tyson
21 Food within the context of the fraud, so there is no deduction in the restitution amount
22 warranted at the sentencing for "any financial benefit realized by the victims of the
23 fraud." *Price*, 2020 WL 7647368, at 3.

24 **B. The Government Has No Position, Role, Duty, or Burden Related To A**
25 **Private Dispute Between Defendant and Tyson Food**

26 The United States has no position, role, duty, or burden in any subsequent hearing
27 in this case related to the three alleged offsets, or in any civil proceeding between Tyson
28 Food and Defendant, Defendant's claims involve a private dispute between those parties

1 and are not related to the criminal conduct and resultant losses investigated by the
2 United States. In *Crawford*, the court placed the burden of establishing an offset on the
3 defendant pursuant to 18 U.S.C. § 3664(e), which provides that the court shall determine
4 who bears the burden of demonstrating matters other than loss or financial resources.
5 See 169 F.3d at 593 n. 2; see also *United States v. Gagarin*, 950 F.3d 596, 608 (9th Cir.
6 2020), cert. denied, 210 L. Ed. 2d 887, 141 S. Ct. 2729 (2021) (the district court properly
7 placed the burden of establishing the right to an offset on the defendant); *United States*
8 v. *Serawop*, 505 F.3d at 1112, 1127 & 1128 nn. 5–6 (10th Cir. 2017) (under 18 U.S.C.
9 § 3664(e) that the defendant bore the burden of establishing the amount of an offset);
10 *United States v. Sheinbaum*, 136 F.3d 443, 449 (5th Cir. 1998) (“Logically, the burden
11 of proving an offset should lie with the defendant.”); *United States v. Harwood*, 854 F.
12 Supp. 2d 1035, 1054 (D.N.M. 2012) (same). The United States has no information or
13 knowledge about the three alleged offsets. The offset claims are far outside of the United
14 States’ investigation in this matter. These are private disputes between Defendant and
15 Tyson Food. As such, the United States takes no position as to whether the Court should
16 have a subsequent hearing involving these offset allegations after it enters a restitution
17 award at sentencing.

18 **C. Defendant’s Presence Is Not Required At Any Subsequent Restitution
19 Hearing**

20 If the Court determines that an additional restitution hearing is warranted under
21 § 3664(d)(5), Defendant’s presence is not required by Fed. R. Civ. P. 43(a)(3) for two
22 reasons. First, Rule 43 does not apply to a continued restitution hearing by the plain
23 language of § 3664(c). Second, a subsequent restitution hearing in this case would not
24 constitute sentencing. Accordingly, the Court should not delay Defendant’s reporting
25 to BOP custody even if it decides to hold a restitution hearing post-sentencing.

26 Rule 43(a)(3) provides that “the defendant must be present at … sentencing.”
27 However, Rule 43 does not apply to the Court’s award of restitution. The Court’s
28 restitution award is entered pursuant to the MVRA. Restitution awards under the

1 MVRA are subject to the procedures of § 3664. Section 3664(c) specifically provides
2 that “[t]he provisions of this chapter, chapter 227, and Rule 32(c) of the Federal Rules
3 of Criminal Procedure shall be the only rules applicable to proceedings under this
4 section” (emphasis added). *See United States v. Stivers*, 996 F.3d 800, 801 (7th Cir.
5 2021) (“§ 3664(c) supersedes Rule 43(a)(3) based on the plain language of the statute”).

6 “By ‘explicitly stat[ing]’ that no other federal rules applied, Congress clearly
7 expressed its intent to suspend the requirements of Rule 43(a)(3) for restitution orders
8 entered under § 3664 … [and] [t]he upshot is that Rule 43(a)(3) does not apply to the
9 restitution order in this case.” *Id.*; *see also United States v. Robl*, 8 F.4th 515, 528 (7th
10 Cir. 2021) (“The plain language of [§ 3664] therefore clearly forecloses the
11 applicability of Rule 43(a) and Rule 32(i)(4)” to a restitution hearing); *United States v.*
12 *Wyatt*, 9 F.4th 440, 454 (7th Cir. 2021) (finding no error in awarding restitution outside
13 of Defendant’s physical presence). Accordingly, there is no requirement under Rule 43
14 that the Defendant be present for a subsequent restitution hearing and his reporting to
15 BOP should not be delayed in the event such a hearing is set by the Court.

16 Moreover, as noted above, the United States has met its burden and established
17 the amount of actual loss in this matter and the Court should enter an award of restitution
18 in that amount at sentencing, at which the Defendant will be present. What Defendant
19 seeks in his request to continue the restitution determination is really an accounting for
20 potential offsets unrelated to the underlying crime and resulting loss. Regardless of the
21 propriety of that type of hearing under § 3664(d)(5), such a hearing is clearly not
22 “sentencing” within the plain meaning of Rule 43(a)(3) and, therefore, Defendant’s
23 presence would not be required and his reporting to BOP custody should not be delayed.

24 CONCLUSION

25 For the foregoing reasons, the United States respectfully requests that the Court
26 enter a restitution award in the amount of \$178,120,382 at sentencing and, if it decides
27 to have a later hearing involving the alleged offsets, not delay Defendant’s reporting to
28 BOP custody as a result.

1 Respectfully submitted this 30th day of September 2022.

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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on the date indicated herein, I caused a true and correct copy
3 of the foregoing to be filed with the Clerk of Court using the CM/ECF System, which
4 will send notification of such to all attorneys of record.

5 *s/ Brian M. Donovan*

6 Brian M. Donovan

7 Assistant U.S. Attorney

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